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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

WALTER A. LAVENDER, Administrator of the Estate of Charles Lee Hunter, Deceased,
Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri

and

BRIEF IN SUPPORT THEREOF.

JURISDICTION OF THIS COURT.

This court has jurisdiction under the sections of the judicial code, cited by petitioner, to issue its writ of certiorari if, in the judgment of the court, the record in the case in the Supreme Court of Missouri, justifies the issuance of the writ, which this respondent denies.

OPINION OF THE COURT BELOW.

It is correctly stated in the brief of the petitioner that the case in which the Supreme Court of Missouri rendered its opinion was decided on the 14th day of March, 1949, has since become final and is set forth in the record on pages 118-127, and is reported in 219 S. W. 2d 353.

STATEMENT OF THE CASE.

While the history of the litigation, the substance of the pleadings, and the instructions of the court, at the trial of the case are correctly set forth by petitioner, this respondent is not satisfied with the statement of facts set forth in the petition for the writ of certiorari. The respondent, therefore, makes its own statement of facts, as follows: The respondent operates a system of railroads through various states of the union, including Illinois, Kentucky and other states to the south and southeast, and at the time of the occurrence in question it was operating trains over said system engaged in interstate commerce, including the train on which the fatal accident to young Hunter occurred on the 28th of March, 1942 (R. 22).

The decedent, Hunter, was one of the members of a dining car crew which had come up from Florida (R. 25), on a train known as the "Sun Chaser," arriving in Chicago on the evening of March 28th about 9:30 o'clock. Owing to heavy transportation in wartime, that train had carried two dining cars (R. 47).

The crew of the car in which the decedent worked was to go back south on train No. 9 about 11:05 that same evening, and the members of the dining car crew were privileged to go where they pleased during the interval between the time of arrival of that train and the departure of train No. 9 which was to take the same dining car and crew down to near Fulton, Kentucky, as "deadhead" (R. 25), and in active service from there south.

That particular dining car crew consisted of six waiters (including decedent) four cooks and a steward (R. 41). The steward was a white man, while all the other members of that crew were negroes (R. 43).

Having arrived at the 12th Street station in Chicago, which is the end of the line, the decedent, who was 18 years old and not well acquainted in Chicago (R. 48), went along with two of his friends, McCampbell and Peyton (both waiters) toward the south end of Chicago where they visited with some friends of Peyton (R. 48), and when their visit was concluded they caught train No. 9 at the 63rd Street station (R. 26, 49), which is well towards the south end of Chicago, and immediately entered the dining car in which they were to ride through the night, their work as waiters not to begin until they began to prepare for breakfast.

All they had to do through the night was to put away the tables and chairs, raise a trap door leading down into a compartment under the floor of the car called the "possum belly", where the cots and bedding for the dining car crew had been stored during the day, get them out and then make down their cots, prepare for bed and retire (R. 25), and they were not required to get up until five o'clock in the morning, when they would dress, put away the beds and bedding, reinstate the tables and chairs and be ready to serve breakfast about 7 o'clock at Fulton, Ky.

Peyton, McCampbell and Hunter were good friends and on the very best of terms (R. 48).

Immediately upon entering the dining car, Peyton, who seems to have been in a playful mood, grabbed one of the cooks (R. 98) from behind and began to struggle with him. That cook quickly shook him off and went on about his business. Peyton then came over to a table which had not yet been removed, upon which McCampbell had placed his grip, which he had opened, and he was in the act of taking a revolver, which he had carried in his right-hand overcoat pocket while off duty, and placing it in his grip.

Still in a playful mood, Peyton undertook to romp with McCampbell while he had the revolver in his hand. McCampbell testified that Peyton also had a pistol (R. 28), though no other witness said he saw it. McCampbell testified that before he had gotten his pistol to the grip, Peyton either struck it with his pistol (R. 28) or grabbed it with his hand, and thus either knocked or shoved the pistol around to McCampbell's right, and at the unfortunate moment when it was so pointed that the decedent was directly in front of it and several feet away (R. 29), the pistol was accidentally discharged, the bullet entering the decedent's chest and inflicting a wound upon him from which he died in the hospital at Kankakee, Illinois approximately 30 hours after he was shot (R. 53, 54).

It has never been claimed by anybody that Hunter was intentionally shot, but everybody has recognized the fact that the shooting was an unfortunate accident. All of the evidence shows clearly that it was the result of foolish horseplay being indulged in by two members of the crew with a pistol.

The plaintiff proceeded on two theories. **First**: that the defendant was liable because the men handling the pistol were engaged in the discharge of their duties in getting ready for bed, and, **second**, that the defendant was guilty of negligence in permitting employees in the dining car habitually to indulge in horseplay and to carry pistols, which made the place to work unsafe.

As to the first theory, none of the evidence tended to show that any of the duties of any of the employees in the crew required them to have pistols or that they had ever been furnished pistols to be used in the discharge of any duties of any kind (R. 51). Their duties were those of ordinary dining car cooks and waiters, such as prepar-

ing meals, getting the tables in readiness, taking orders and serving them to passengers in the dining car (R. 50).

All of the evidence showed that the horseplay referred to was such as is always found where a number of colored men are working together. At times they pushed each other, slapped each other on the back, or goosed a fellow that was ticklish (R. 20). This had gone on for years with the dining car crew and had never resulted in injury to anybody nor caused anybody to be in danger of being injured. **There was no evidence that at any time on any previous occasion in the entire history of the railroad any dining car waiter or cook had indulged in horseplay while having a pistol in his hand.**

The two waiters, McCampbell and Peyton, were not discharging any duty whatever, nor doing anything that had any tendency to further the business of the master when they were playing with the pistol.

On that subject McCampbell, a witness called by the plaintiff, testified in cross-examination as follows (referring to the pistol, R. 49):

> "Q. When you took it out, and before you quite got to the bag with it, some of the waiters that didn't have anything to do except go to bed got to playing with each other? A. Yes.
>
> Q. One of them slapped or goosed him or something? A. Yes.
>
> Q. In play? A. Yes.
>
> Q. And when you raised this pistol in your hand you raised that in play? A. Yes.
>
> Q. And when Peyton grabbed your hand or struck the pistol he did that in play? A. Yes. • • •
>
> Q. Nobody connected with the company had ever told you a part of your duties was to handle a pistol? A. They never told me that."

It was admitted at the trial that both respondent and deceased were engaged in interstate commerce at the time of the happening of the accident, and the suit was based on the Federal Employers' Liability Act.

McCampbell explained how he came to have the pistol at the time of the shooting. He said he had had some fusses with a cook named Hubbard, who had formerly been a part of the dining car crew in which McCampbell and the other men were working on the night of the accident. It was in the early part of January of 1942, or late December, 1941, when they had their last quarrel. Hubbard then picked up a pistol and told McCampbell that if he did not get out of the kitchen he would kill him. Concluding that "discretion is the better part of valor," McCampbell left without further argument.

A day or two later McCampbell wrote to the superintendent of dining car service, Mr. Patterson, and told him of the quarrels and of threats made on two occasions by Hubbard, but the letter which he wrote (R. 37) did not tell Mr. Patterson about Hubbard's pistol.

Mr. Patterson answered promptly and assured McCampbell that he had taken action which, he was sure, would prevent such an occurrence in the future (R. 37). **After that Hubbard was never on the same dining car with McCampbell** (R. 47) **and McCampbell never saw him again until the day of the accident,** when they came up on separate dining cars on the "Sun Chaser," two dining cars being used because of heavy war traffic (R. 47). The two men were where they could look from one car into the other and see each other, but had no contact, no dealings, no conversation with each other (R. 47).

That night in Chicago, before McCampbell left the dining car in which he worked, one or more of his friends in the

crew told him that Hubbard was laying for him (R. 24, 47), which was probably a practical joke, and McCampbell, therefore, took his pistol out of his grip where he customarily had carried it since Hubbard's threat in January, and put it into his right-hand overcoat pocket for his protection in the event that he should be assaulted by Hubbard. It turned out that the two did not meet.

When McCampbell got back to the dining car at the Sixty-third Street station, on the southbound train No. 9, he was not expecting to see Hubbard, who had no business on that train, and, in fact, was not on the train (R. 49-31).

The evidence all showed that only dining car waiters and cooks were on that dining car from the time it left the Twelfth Street station until after the accident occurred. The train conductor, Mr. McElroy, since retired, and the train porter were collecting tickets in the front car of the train ahead of the diner (R. 57), while Mr. Beverlin, the dining car steward, had gone to bed in a Pullman car before the train left Twelfth Street and was sound asleep in his berth when he was awakened to be told about the accident (R. 63).

As to the charge of failure to exercise ordinary care to furnish Hubbard a reasonably safe place to work, that charge was limited to horseplay such as has been above described and to permitting dining car waiters to bring loaded pistols into the car.

McCampbell alone testified that over a period of something more than a year he had known four or five waiters to bring pistols into the dining car (R. 29-30). He never testified that he ever saw any of them at any time playing with such pistols, or that they were loaded pistols, or that any representative of the master (who could only have

been McElroy or Beverlin) was ever present when such pistols were brought into the car.

After the plaintiff's case had been closed, and all of defendant's witnesses had testified and defendant had rested, **the plaintiff's lawyer recalled McCampbell in rebuttal and attempted to show by him that the dining car steward, Beverlin, had been present when some of the waiters had pistols. But McCampbell would not and did not so testify.** Turning to record page 104 we find the following:

> "Q. I'll ask you—you testified here yesterday seeing these men have pistols in the dining car when they were bedding down—**I'll ask you if you ever saw them have them out when the steward was there?**
>
> The Witness: **I couldn't say they had them the particular time the steward was there.** * * *
>
> Q. **Did you ever see them have pistols in the dining car when the steward was there?** A. **I couldn't say whether he was there at that particular time or not"** (R. 104).

Petitioner's oft-repeated statement that respondent **permitted employees to bring pistols into the car is not borne out by the record.** There was no evidence whatever offered tending to show that either Beverlin or the train conductor, McElroy, had ever been present when anybody had a pistol in the car, or had ever heard of such an occurrence, and those two men positively denied ever knowing of any such thing.

As to the incident early in January, 1942, when Hubbard picked up his antique pistol (see description, R. 23) and threatened McCampbell, that had no bearing upon the case, for even if Mr. Miller, down in Fulton, Kentucky, who had assigned men to their crews, knew of it, which is

not clear from McCampbell's evidence, the situation was changed almost immediately, for McCampbell testified, as above stated, that after that letter was received Hubbard was never on the car, and he never saw him again until he saw him on a different car on March 28th, hours before the shooting occurred. Hubbard was not present when the accident happened (R. 47).

It is not disputed that the decedent left dependents, as testified to by both his parents.

SUMMARY OF ARGUMENT.

(1)

Petitioner's assertion that the evidence **amply sufficed** to make the issue of negligence of respondent and its waiters **acting in the scope of their employment** one for the jury is wholly unsupported by any evidence, **all the evidence on the subject clearly showing that McCampbell and Peyton had ceased to do anything for respondent and were playing for their own amusement alone when they caused the pistol to be fired, fatally wounding Hunter.** The act was completely separated from respondent's work—as completely as if it had been performed by two men who had never been employed by respondent.

Therefore, there was no issue to submit to the jury as to the shooting being done by servants acting in the line of their employment and in the scope of their duty.

(2)

The Supreme Court of Missouri did not find that the act of firing the pistol was committed by McCampbell and Peyton **"while working in the line of their duty and within the scope of their employment"** as asserted by petitioner's counsel in his brief; but that court expressly held (R. 125) that **all the evidence showed that McCampbell and Peyton were not acting in the line of their duty or in the scope of their employment in playing with the pistol, and also that such act did not tend to further respondent's business,** all of which is manifestly true.

The Missouri Supreme Court did not violate the rule requiring appellate courts to give a plaintiff the benefit of all evidence favorable to him and of every reasonable in-

ference in his favor that may reasonably be drawn from the evidence, and to assume that evidence which is favorable to plaintiff is true and to disregard evidence offered by defendant which is unfavorable to plaintiff.

Giving petitioner the full benefit of that rule, there was no issue of fact upon which a verdict in plaintiff's favor could be based, and therefore no issue to submit to the jury.

(3)

There were no facts shown by any evidence tending to prove either actual or constructive notice to respondent that any member of the dining car crew would be—or might be—carrying and playing with a loaded pistol on the night of the accident. There was therefore nothing to give notice that the place to work was unsafe, if it was unsafe.

As to the cook, Hubbard, whatever danger might have existed because of his antique pistol in the kitchen on the night of his quarrel with McCampbell in late December of 1941 or early January of 1942, there had been no possible danger from that source since early in January 1942, **when Hubbard left that dining car and was never thereafter a member of that crew.** That was almost three months before the accident (R. 47). If Hunter's place to work had ever been dangerous or unsafe on account of Hubbard and his pistol (which no evidence tended to show), such menace—real or imaginary—passed away when Hubbard left that dining car crew.

Respondent was not shown to have had actual knowledge of the presence of any pistol anywhere in the dining car until after Hunter was shot, when the train conductor and the steward were notified of the accident.

The only two representatives of respondent to whom notice could have been given were the conductor and the steward, and both of them testified they had never known or heard of a pistol being brought into the dining car before the accident, and they were not contradicted. McCampbell, though recalled in rebuttal, and asked specially if he had ever seen the steward present on any occasion when anyone had a pistol, refused to testify that the steward ever was present (R. 104).

As to pistols that McCampbell claimed were brought in on other occasions, they were not shown to have been loaded, nor to have been handled in play, or displayed in such manner as to threaten danger to anyone.

There was, therefore, neither actual nor constructive notice to respondent of anything that would render the dining car an unsafe place to work at any time. The ruling of the Supreme Court of Missouri on that point was the only ruling that could have been made without utterly disregarding the law and the evidence.

(4)

This point in petitioner's brief is a repetition of what was said in the latter point of his Point (2).

The Supreme Court of Missouri reviewed the evidence exactly as petitioner says it should have reviewed it, and so reviewing it, ruled exactly right.

(5)

There is nothing in the record to indicate that the Supreme Court of Missouri failed to take into consideration the testimony of any witness, as charged by petitioner.

When all the evidence is reviewed, it is found to fall short of revealing anything that tends to show negligence on the part of respondent or any servant acting for it, which in whole or in part caused the fatal injury to Hunter.

(6)

This court on considering all the evidence in the record will find nothing to justify a verdict for petitioner.

(7)

An employer is not obliged to have a vivid imagination and use it to conjure up every possibility of accident or which the human mind can conceive. All he is required to do is to exercise such care and foresight as could reasonably be expected of a reasonably careful employer.

ARGUMENT.

(1 and 2)

At page 57 of petitioner's brief, this statement is found: "There was therefore sufficient evidence that Hunter, the deceased, was shot and injured through the negligence of his fellow workers while they were all working in the line of duty within the scope of employment and in furtherance of respondent's business." That statement is not supported by any evidence in the case, but is squarely in the teeth of the evidence offered by the plaintiff himself and corroborated by defendant's evidence.

What employment of McCampbell and Peyton required them to **play** with a loaded pistol in the dining car? That was all they were doing when the pistol was fired, so McCampbell testified (R. 49). They were not watchmen whose duty required them to carry pistols with them. Pistols had not been furnished them by respondent for use at any time. Even if a watchman is under the duty to carry a pistol, his employer is not liable for injury caused by playing with it or handling it in a manner that has nothing whatever to do with the duties of his employment. If a watchman found it necessary to shoot at a trespasser, a thief or a robber in order to protect his employer's property which he had been employed to protect, and if, in discharging that duty, he so carelessly handled the pistol that an innocent bystander was shot, the employer of the watchman might thereby be rendered liable in damages to such innocent bystander. But if a watchman, carrying a pistol by order of his employer, uses the pistol for play, to demonstrate his skill to bystanders, or for any other purpose of his own, he thereby steps aside from the line of his duty, and, for injuries caused by his negligence in so

handling the pistol under such circumstances, his employer is not liable.

We shall now call the court's attention to a number of cases arising from horseplay on the part of employees, and in which it appears that in indulging in such horseplay (just as the dining car waiters in this case were doing), or in anything else outside of the scope of their employment, the man or men causing injury to a fellow employee were held not to be representing the master and their negligent acts were held not to be attributable to the master because they were not performed in furtherance of his business.

In the case of

Reeve v. N. P. Ry. Co., 144 Pac. 63, 82 Wash. 268,

two employees were wrestling, purely for their own amusement, in a baggage car. While so doing, one of them bumped into a third employee, knocked him out of the car and caused him to be severely injured. The suit was brought under the Federal Employers' Liability Act and all of the employees in their usual employment were under that act.

But the Supreme Court of Washington held that the wrestling was not done in the performance of any duty, in the scope of the employment of either employee, and had no tendency to further the business of the employer.

Holding that the employees engaging in such horseplay had stepped aside from their employment and were not acting as servants of the railroad, the court held that the railroad was not liable for their conduct which resulted in injury to plaintiff.

In the course of the opinion the court cited White's Personal Injuries on Railroads, Section 227, a text which fully supports the court's holding.

In the case of

Railway Express Co. v. Tait, 100 So. 428,

an express agent on an express car was required to carry a pistol to protect the express company's property. While the car was standing in a station said express agent was demonstrating his pistol to a friend, when it was accidentally discharged and the bullet struck the plaintiff, who was in the waiting room of the railroad station, and injured him severely. He sued the employer of the express agent, but was denied recovery because the act was outside of the scope of said agent's employment.

Similar rulings have been made in many cases, regardless of whether the appliance which was so handled as to cause injury was owned by the servant or by his employer.

A case very squarely in point is that of Osment v. Pitcairn, 159 S. W. (2d) 666, 349 Mo. 137, decided by the Supreme Court of Missouri.

In that case the evidence showed that one of the employees was a big powerful fellow who was very proud of his physical strength, and frequently grabbed hold of employees in a way that would make them squirm, while he laughed. On the occasion in question he grabbed the plaintiff in his arms and squeezed him until he broke one or more ribs. **The men were engaged in interstate commerce, and the suit was brought under the Federal Employers' Liability Act.** When the point was made that the act was outside of the scope of the husky employee's employment, plaintiff tried to recover on the theory that the master was negligent in not protecting him from such horseplay, and showed that a man who was a railroad policeman was present when it occurred.

The Court held that there could be no recovery, inasmuch as the act complained of was not in the scope of the

employee's employment and was not in furtherance of his master's business. The Court further held that there could be no recovery on account of failure of the policeman to prevent the occurrence.

The case of Davis v. Railroad, 260 U. S. 349, decided by this Court, was cited by this Court in the Osment case.

From the statement of facts by Mr. Justice Holmes, who wrote the opinion in the Davis case, it appeared that the plaintiff's husband, who was a conductor on the defendant's line of railroad, had been wilfully killed by the engineer of the train on which he worked. That suit was based on the same Federal Act.

The Court said at page 352:

> "The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words, that he did a wilful act wholly outside of the scope of his employment while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of respondeat superior applies."

The judgment of the Mississippi court which had allowed a recovery was reversed.

In the case of Jackson v. Railroad, 178 Fed. 432, it was held that a track foreman who had occasion to run on a power car out in the country and carried a shotgun with the intention of shooting ducks, if he saw any, did not render the railroad company liable by discharging his gun in a negligent manner so that plaintiff was injured. That ruling was based on the rule which we have above stated.

In the case of Rohrmoser v. Household Finance Corp., 86 S. W. (2d) 103, the evidence showed that a collector for

the defendant went to plaintiff's apartment to collect one or more installments due on furniture purchased by her and her husband from the defendant. The plaintiff, who was a housewife, admitted the collector to the apartment, she being alone. After talking to her and learning that she and her husband did not have the money to pay the installment, the collector became insulting, made some very ugly, insinuating remarks, grabbed hold of the plaintiff and tore her dress straight down the front and in the ensuing scuffle injured one of her fingers. In being guilty of such conduct the collector was not trying to force payment and was certainly not doing anything to further the interests of his employer. The Supreme Court of Missouri held that his act was outside of the scope of his employment and, reprehensible as it was, the defendant was not liable to plaintiff for her injuries or insult.

In the case of Gens v. Wagner Elec. Mfg. Co., 31 S. W. (2d) 785, the Supreme Court of Missouri held that there was no liability in a case in which a mischievous youth, in horseplay, jerked a chair out from under a young woman employee as she was sitting down in it, causing her to fall and sustain serious injuries.

In an opinion by Judge Atwood, the Supreme Court of Missouri held that, since the evidence showed that the sole cause of injury was the negligence of said youth in jerking the chair from under the plaintiff, which act, the court said, was entirely outside the scope of his employment, there could be no recovery.

Answering the contention of the plaintiff that even if it appeared that the unlawful act of the employee was in no proper sense incident to his employment, yet the plaintiff was entitled to recover if there was a ratification by the master, the court held that the evidence showed that the

employee in question was of a mischievous disposition and that he frequently surprised girl employees by poking them in the ribs suddenly, but that there was no evidence that he had ever hurt anybody or that he had ever jerked a chair from anybody before that time.

So, in the case at bar, while the evidence shows that some of the negro waiters occasionally engaged in play like big boys, scuffling and pushing each other around, there was no evidence that McCampbell had ever engaged in such horseplay or horseplay of any kind, and there was no evidence that he ever carried a pistol in the dining car before where the steward or the conductor could know of it. The evidence offered by plaintiff clearly shows that no vice principal of the master was present in the dining car when the shooting occurred, the train conductor being engaged in collecting tickets in a day coach and the steward having gone to bed in a Pullman car.

The back slapping and pushing shown to have been indulged in on previous occasions, was never such as to endanger anyone. While McCampbell said he had seen pistols in the car about 4 or 5 times over a period of more than a year, he said he could not say that any waiters or cooks ever had pistols out at any time when the steward was in the dining car (R. 104).

The evidence wholly failed to show notice to the steward or the train conductor of any such thing and both of them testified that they never knew or heard of such a thing being done (R. 58, 65).

In the case of Phillips v. Western Union Tel. Co., 270 Mo. 676, 195 S. W. 711, the evidence showed that the defendant's servant, a messenger boy, was on his way to the office of the company at Grand Ave. and Olive St. in St. Louis. He passed a newsboy who had some papers, and asked the newsboy to give him one. The newsboy refused, and the telegraph boy ran towards the office of the company, having snatched a paper from the newsboy and looking back as he ran. While running in that negligent manner he ran into the plaintiff, who was a woman, knocked her down and inflicted serious injuries upon her. She sued and obtained a verdict for $10,000. But the judgment was reversed outright by the Court for the reason that the messenger boy had departed from the line of his duty when he grabbed the newspaper and ran away with it.

In the case of **Dewing v. N. Y. Central R. R. Co.**, 183 N. E. (Mass.) 754, the evidence showed that plaintiff, who was a porter, worked with other porters loading and unloading sacks of mail in a station. The plaintiff was one of those individuals commonly described as "goosey." That fact having been discovered by his fellow workers, they frequently "goosed" him while they were working. They made him believe that they were going to goose him as he was lifting a heavy sack of mail, and he jumped and put a strain upon himself in such a way that it inflicted injury. The Massachusetts court held that such conduct, being entirely outside of the scope of the employment of plaintiff's fellow workers, the railroad company was not liable.

In the case of I. & G. N. R. R. Co. v. Cooper, 32 S. W. 517 (a Texas Supreme Court case), the facts were as follows:

A young man, who was a laborer employed by defendant, was riding on a tender of an engine, with the consent of the enginemen, who were on duty and actually engaged in running the engine. One of them took a hose which was connected with the boiler and could be used, by turning the valves, so as to discharge either hot or cold water. Intending to frighten the plaintiff, but not to hurt him, the fireman went up behind him and gently put the nozzle of the hose into plaintiff's hip pocket. The engineer thought that the other end of the hose was then connected with the cold water, and he turned the water on, expecting to play a funny prank. But, unfortunately, the hose was connected with scalding water, and the plaintiff was seriously injured. He was denied recovery by the Supreme Court of Texas, because, though the act was performed by servants who were regularly employed by the defendant in running the engine, and at a time when they were earning pay for their services in so doing, they departed from the line of their duty and the act which they performed in furtherance of horseplay did not render their master liable.

In the case of Canton Cotton Warehouse Co. v. Tool, 78 Miss. 147, the plaintiff and one or two companions were invited by the defendant's night watchman to visit the plant at night and watch the process of making ice. The plaintiff was a greenhorn, fresh from the country. The watchman planned to have some fun by frightening him. He told him a scarey tale about the explosion of a boiler

in that plant a short time before plaintiff's visit. Then one or two other employees, who were in the prank with the watchman suddenly turned off the electric lights, one of them permitted steam to escape, making a terrifying noise, and a scoop shovel was drawn up and down an iron stairway, making a very loud noise. The plaintiff and his companions stampeded like a herd of steers, and, in their hasty flight through the darkness, the plaintiff fell and was badly injured. The Supreme Court of Mississippi said:

> **"The inquiry is not whether the act in question in any case was done, so far as time is concerned, while the servant is engaged in the master's business; nor as to the mode or manner of doing it, whether in doing the act he uses the appliances of the master, but whether, from the nature of the act itself, as actually done, it was an act done in the master's business or wholly disconnected therewith by the servant, not as servant, but as an individual on his own account."**

Holding that the acts complained of were entirely outside of the scope of the employment of the servants in question, the judgment which plaintiff had recovered in the lower court was reversed outright by the Mississippi Supreme Court.

In the case of Bowen v. I. C. R. R. Co., 136 Fed. 306, the U. S. Court of Appeals of the Eighth Circuit held that there was no liability on the part of the railroad in a case involving rather unusual facts.

It appeared that a man named Steagald had for some months prior to the occurrence in question held the position of station agent for the railroad and also that of agent for an express company in a little town in South Dakota. The decedent went into the depot to inquire whether or

not there would be any demurrage on a shipment of a carload of coal if it was unloaded that day. The agent informed him there would be no such demurrage. The business between the decedent and the railroad company ended with that answer, and the decedent turned away to leave the depot, but Steagald called to him that he had a package for him and passed out a book through the ticket window on which the decedent was to sign a receipt. It did not appear whether the package in question was being handled by Steagald as station agent or as express agent. While the decedent was writing his name Steagald suddenly picked up a pistol and shot him, and then came around into the waiting room and shot him again, causing his death almost immediately. The evidence did not show that any argument had occurred or was occurring, and it was a mystery why the agent should shoot the decedent. The U. S. Court of Appeals for the Eighth Circuit held there was no liability, because the evidence failed to show that the shooting was done in order to further the business of the defendant employer. Judge Phillips, who wrote the opinion, cited a large number of cases.

A case very much in point in the case at bar is that of Evers v. Krouse, 58 Atl. Rep. 181 (New Jersey). Suit was brought in that case to recover the value of a horse and wagon. The defendant's minor son had been directed to sprinkle his father's lawn, using a garden hose. The horse had been tied in front of the home next door. The boy thought he saw a chance for some fun, so he turned the hose on the horse, which caused it to break loose and run away, demolishing the wagon and injuring the horse so severely that it had to be killed. A verdict was returned in favor of the plaintiff. The trial court had given this instruction:

> "The boy was engaged in sprinkling the lawn. He was accustomed to doing it. It was his father's lawn.

Was he then in his father's service while he was doing that? Was that his father's business? If he was, then for the misconduct of the boy in the use of the things which he was doing about his father's business the father would be responsible just as if the father himself had done it. So if you find that the boy was in his father's service, and through neglect of ordinary care, or from a mischievous disposition, threw this water upon or over the horse in such a way as was likely to frighten the horse, then both father and son would be responsible."

The appellate court held that that instruction was wrong and reversed the judgment outright.

In the case of Galveston etc. R. R. Co. v. Currie, 96 S. W. (Tex.) 1073, a foreman of a railroad company indulged in foolish horseplay which resulted in killing one of the men in the crew under him.

The place where they were working was equipped with an air hose with very strong pressure, which was used in connection with some of the work the men had to do. While one of the employees had his back to the foreman, the foreman, thinking to have some fun by scaring and making him jump, put the end of the hose close to the seat of employee's pants and turned on the air. It frightened the employee and made him jump and everybody laughed, nobody suspecting that any injury had been caused. But in a few minutes the victim of the prank turned pale and sick, collapsed and was taken to a hospital, where it was found that the compressed air had entered his rectum and ruptured an intestine, which caused him to die of peritonitis.

The Texas court held that the prank was outside of the scope of the foreman's employment, in no wise pertained

to the master's business and did not tend to further it, and that, therefore, there was no liability on the part of the railroad company.

Many cases which support respondent's contention are cited in that opinion on page 1075, in the last column on that page.

The same case is cited in 10 L. R. A. (N. S.) 367, with a good collection of cases in the notes.

In the case of Johnson v. R. R. Co., 141 N. W. 430, 157 Ia. 730, it appeared that a brakeman on a freight train wanted to make a date with a young woman whose house was near the railroad track. The brakeman had charge of torpedoes that were used in giving warning to other trains. He attached a note, addressed to the young lady, to one of the torpedoes and threw it off in front of her home. Her sister found the torpedo with the note and gave it to the girl to whom the note was addressed. The torpedo exploded and injured her.

In a suit by her to recover damages it was held that the act was outside of the scope of the brakeman's employment and there was no liability.

In the case of Sullivan v. L. & N. R. R., 74 S. W. 171 (Ken. Ct. of App.), a member of a switch crew put a torpedo on the track to scare the engineer and the fireman of another crew. One of that crew was injured and sued the railroad, but he was denied recovery because the act of the switchman who tried to scare him was outside of the scope of his employment.

In the case of Texas Breeders and Racing Assn. v. Blanchard, 81 Fed. (2d) 382, a watchman, who was employed on the grounds of the racing association and was required to carry a pistol, was twirling it around his finger

to show a visitor how skillful he was, when the pistol was discharged and wounded a third person, who brought suit against the employer of the watchman. It was held that there was no liability because his act was outside of the scope of his employment.

In the case of Novelty Theatre Co. v. Whitcomb, 47 Colo. 110, 37 L. R. A. (N. S.) 514, a similar ruling was made.

In the case of Priest v. F. W. Woolworth 5 & 10 Cent Store, 62 S. W. (2d) 926, the evidence showed that the plaintiff was a customer in defendant's store in Poplar Bluff, Mo., when the manager of the store, who had an idea that he was a great humorist, walked up to her and pushed her back over a counter, injuring her back on a glass frame that projected above the counter several inches. He did it just in fun, though what would be funny about it is hard to understand. The manager was not attempting to make any sale or collect any bill or do any other act in the furtherance of the defendant's business, but was simply acting as a smart aleck. The manager's name was George. At page 928 the Springfield Court of Appeals said:

> "Plaintiff in this case had committed no act demanding that George should use any violence toward her. She was simply a customer with a perfect right to be there. George, in an act of clowning or buffoonery, committed the assault. He was performing no duty for his employer. He was giving vent to his own whim or pleasure of the moment, which had nothing whatever to do with his employment. Under such circumstances, we think there was no question for the jury and that the trial court should have directed a verdict for defendant."

In the case of Atlantic Coast Line R. R. Co. v. Southwell, 48 Sup. Ct. R. 25, the suit was by the administratrix of one Southwell. She obtained a verdict in the lower

court in North Carolina and the railroad company appealed to the Supreme Court of that State, which affirmed the judgment. The case was then carried to this Court, where the judgment was reversed outright.

As appears from the opinion by Mr. Justice Holmes, the effort of the plaintiff was to hold the railroad company liable for its negligence in permitting and not preventing the murder of the deceased. **The suit was based upon the Federal Employers' Liability Act**, and the question was whether there was any evidence that the death resulted in whole or in part from the negligence of any officer or agent of the railroad.

It appeared from the evidence that the general yardmaster, who was the railroad's vice principal, knew that the decedent on previous occasions had used threatening language toward Dallas, who shot him, and that the yardmaster should have known that they were likely to meet when they did, and that a difficulty was likely to ensue. The yardmaster did not follow the matter up nor take any steps to prevent a difficulty. There was a strike on at the time and Dallas was a special policeman and was armed. The decedent had said to the yardmaster: "Cap, all I want to do is to ask Southwell to lay off of me and let me alone", and the yardmaster replied that he must not see Southwell for if he saw him and talked to him it might bring about unpleasant consequences. The yardmaster saw the two men approaching each other and had taken a few steps towards them with a view to separate them in case of an altercation, but before he had to time to reach them the shot which killed Southwell was fired.

This Court held that there was no liability on the part of the railroad company.

In the case of Sheaf v. M., St. P. & S. S. M. R. R. Co. et al., 162 Fed. (2) 110, **the suit was one under the Federal**

Employers' Liability Act and the U. S. Circuit Court of Appeals for the Eighth Circuit held that said act created no right of action in favor of an employee (or his representative) against a fellow servant, and, therefore, there could be no recovery against the fellow servant who was joined in the case. The decision was rendered on June 18, 1947, by the Court of Appeals. It emphasized the fact that under said Act **liability arises from negligence, not from injury**, and that negligence must be the cause of the injury, and the burden is upon the plaintiff to allege and prove that the negligence of the employer was in whole or in part a cause of the injury complained of.

It appeared from the facts in the case that the plaintiff was injured by the unprovoked assault of a fellow servant and the court held that the employer was not liable **unless the aggressor was at the time of the assault acting within the scope of his employment.**

The facts showed that the conductor, who was slightly hard of hearing, was spoken to by an engineer of his train, who was up in the engine cab while the conductor was on the ground. Being a little hard of hearing, and not understanding what the engineer said, the conductor told him to come down and he could talk to him. The engineer got mad, came down from the engine, ran and grabbed the conductor and threw him to the ground, seriously injuring him.

The Court of Appeals held that the railroad Company could not be held guilty of negligence in keeping the engineer, a man alleged to have been of a violent nature and disposition, in its employ, and that **since the act was not done in the furtherance of the master's business, there was no liability.**

In the case of Wolfe v. Henwood, 162 Fed. (2) 998, the U. S. Court of Appeals for the Eighth Circuit had a case

before it in which it appeared that an employee who had been doing some work that required him to get gasoline and oil on his gloves and on waste which he had been using, undertook to burn the waste to get rid of it and as he did so one of his gloves caught fire. His overalls were soaked with gasoline and oil and the servant thoughtlessly undertook to beat out the fire on his glove against the leg of his overalls. Of course the overalls caught fire and the servant was injured.

It was held by the Court of Appeals that there was no negligence on the part of the master, since the railroad company could not foresee, by the exercise of ordinary care, that Wolfe would do such a dangerous thing.

In that case plaintiff relied upon the case of **Lavender v. Kurn, 67 Sup. Ct. Rep. 598**, as plaintiff in this case does. There was an attempt in that case to distort the opinion in the Lavender case into one establishing a rule of absolute liability whenever a servant is hurt while governed by the Federal Employers' Liability Act, but the Court of Appeals held very emphatically that such a rule does not apply, and said: "The Supreme Court decisions do not hold that a jury question is presented in every Federal Employers' Liability Act case. **The plaintiff must still establish negligence of defendant as a contributing cause of injury. Myers v. Reading Co., 67 Sup. Ct. 1338.**" The Court of Appeals, in the same opinion, cited the following sentence from the Myers case which was one based on the Safety Appliance Act: "This simplified the issue beyond that presented in the ordinary case **under the Federal Employers' Liability Act where the plaintiff must establish the negligence of his employer.**" Later in the opinion at the bottom of page 1001 and top of page 1002, the Court of Appeals said: "The Federal Employers' Liability Act does not subject the railroad to that degree of liability imposed by Workmen's Compensation Law, Myers v. Reading Co.,

supra, nor place the railroad in the position of an insurer of its employees." This Court's declaration in the Myers case after the case of Lavender v. Kurn was decided, shows very clearly that it had no intention to depart from the rule requiring proof of negligence in such cases.

In the case of Smith v. Western Union Tele. Co., 232 S. W. 480, the Supreme Court of Missouri had a case in which plaintiff, a waitress in a restaurant maintained by the defendant for the use of its employees in Kansas City, had recovered a verdict for injuries sustained while running away from a cook who was chasing her with a live mouse, which he was threatening to put on her.

The evidence showed that when plaintiff came into the kitchen the cook called her to the garbage can and showed her a live mouse in it and told her to go get the cat. She went out and hunted for the cat, but came back into the kitchen and reported that she could not find it. During plaintiff's absence, the cook had caught the mouse, and when she entered the kitchen he was holding it behind him. He advanced toward her and then exhibited the mouse and told her he was going to put it on her. She ran to get away from him and, in doing so, fell and so was injured.

The Court denied liability because of the well-known rule that a master is not liable for an act of his servant unless the act is committed in the furtherance of the master's business. Of course, the Court held that chasing a waitress with a live mouse could not possibly further the business of the cook's employer.

In the very recent case of

Hoyt v. Thompson, 174 Fed. (2d) 284,

suit was brought under the Federal Employers' Liability Act to recover damages by a man who was taking no part in horseplay which was going on when he was hurt.

The accident occurred in a washroom in a railroad station. Two employees were engaged in a friendly scuffle for possession of a cake of soap and the use of a wash basin. One of those engaged in the scuffle swung around in such manner that his elbow struck the jaw of an employee who was washing his hands in another basin nearby, causing him to be injured.

The court of appeals of the seventh circuit in a suit brought by the administratrix of the injured employee, whose death was alleged to have resulted from his injury, denied plaintiff liability in the case because the two employees who were scuffling were not acting in the scope of their employment or doing anything for the master.

The U. S. Court of Appeals for the second circuit on May 10, 1949 (reported in advance sheets July 11, 1949), 174 Fed. 572, held in the case of Smith v. Lehigh Valley R. Co. the railroad company was not liable to an employee who was negligently knocked off of the platform while the cook was fighting with another man, because the cook was acting outside of the line of his duty.

A great many cases announcing the same rule could be added to the foregoing; some of them are cited in the opinions in some of those cases.

Referring again to the statement above quoted on page 57 of petitioner's brief, we ask: How could the act of playing with a pistol be classed as working for respondent, either within or without the line of the duty of the two men so playing? They were not doing anything which they had ever been employed to do or told to do (R. 51).

How could such play have any tendency to further the employer's business? By no stretch of the imagination could such horseplay help the respondent in carrying on

any branch of its business in operating a railroad. It could not even help the act of preparing to go to bed.

If it be granted, as so strenuously argued by counsel with so much repetition, that McCampbell and Peyton were making preparations to retire, as a part of their duties, up to the moment when they began to struggle in play with the pistol, from that instant forth they were no longer acting as servants of respondent, but had stepped aside from its service to amuse themselves with horseplay, which had nothing whatever to do with their employment. For their acts while so engaged in such horseplay, respondent cannot be held liable. In playing with the pistol the two men were as completely outside of the scope of their employment and the line of their duty as were the wrestlers in the Reever case, the enginemen playing with the hose in the Cooper case, the foreman in playing with the air hose in the Currie case, the watchman and his fellow pranksters in handling the light switches, the steam control valves and the scoop shovel in the Tool case, the cook in chasing the waitress with the live mouse in the Smith case, the watchman twirling his pistol in the Blanchard case, the express agent demonstrating his pistol in the Tait case, the porter "goosing" his fellow porter in the Dewey case, or the small boy turning the water from the garden hose on a horse in the Evers case, all of which cases are cited above.

The length of time intervening between abandoning duties as an employee and beginning to play or do anything else for the servant's own amusement or for any other reason, is immaterial. A fraction of a second will suffice as well as an hour for him to step aside from his duties.

Since it clearly appears from all the evidence offered by the petitioner, as well as that offered by respondent, that Hunter's death resulted solely from the horseplay in which

McCampbell and Peyton were engaging when the pistol was fired, which had nothing to do with their duties or the scope of their employment and which had not even the remotest tendency to further the respondent's business, respondent cannot be held liable for damages resulting from such horseplay on the theory that McCampbell and Peyton were acting for respondent.

The suit was not brought on the theory that Hunter's death resulted from an assault and there is no evidence in the record tending to show any assault.

But on page 61 of his brief petitioner draws an inference from the opinion of this Court in the case of Jamieson v. Encarnacion, 281 U. S. 641, 50 S. Ct. 441. The inference is not justified by anything said by this Court, and the case has not the remotest bearing on the case at bar.

In that case this Court, at page 441, referred to an assault committed by the foreman as having been "committed in the discharge of his duties and in furtherance of the master's business."

That statement alone shows the clear distinction between that case and the case at bar.

There was no assault of any kind in the case at bar, committed by anybody. An assault is an attempt to commit a violent injury upon the person of another. There was no such attempt or intent here. No one intended that anyone should be hurt or that the pistol should be fired. Therefore there was no assault. Hence, the Missouri Supreme Court opinion is not in conflict with any opinion of any court in any assault case.

(3 and 4)

The evidence did not tend to show any breach of the respondent's duty to exercise ordinary care to furnish Hunter a reasonably safe place in which to work.

Before a master can be held liable for such a breach of duty, it must be shown either that the master by his negligence caused or permitted the place to become unsafe, or that, from any cause whatever, it became unsafe and that the master had actual knowledge of such condition, or that such condition thereafter continued a sufficient length of time to give the master constructive notice of its existence, and he must have had sufficient time after receiving actual or constructive notice to enable him, by the exercise of ordinary care, to remedy the condition. That is elementary law and it applies in cases brought under the Federal Employers' Liability Act as well as to all other cases between master and servant, except cases brought under a Safety Appliance Act and cases brought under the Boiler Inspection Act. Of course, neither of such acts is involved here.

Under the Federal Employers' Liability Act, on which the case at bar is based, negligence must be alleged and proved in order to justify recovery, and it must be shown that the negligence charged was at least one of the proximate causes of the injury.

Wilkerson v. McCarthy, 69 S. Ct. 413;
Myers v. Reading, 67 S. Ct. 1338;
Reynolds v. Atlantic Coastline R. R. Co., 69 S. Ct. 507.

The safe place rule refers to the physical structure and surroundings where an employee is required to work, and not to mere transitory dangers which cannot be foreseen by the exercise of ordinary care.

39 C. J. 345.

Now let us apply the foregoing rules universally laid down by the courts to the facts shown by the record in the case at bar.

McCampbell does not say that any member of the train crew other than himself and Hubbard was in the kitchen of the dining car when Hubbard displayed his antique pistol and threatened to shoot him if he did not get out of the car. In his letter to the dining car superintendent, Mr. Patterson, McCampbell told of the threat, but did not tell about seeing the pistol (R. 37); and it is doubtful from McCampbell's testimony whether he specifically mentioned the pistol to Mr. Miller in Fulton, Ky., though he says he told him all about the trouble he had had with Hubbard several months previous to the accident (R. 35).

All of that becomes immaterial, however, because McCampbell testified that after he wrote the letter to Mr. Patterson, Hubbard was never again with that dining car crew (R. 47).

While McCampbell says he saw Hubbard on the train known as the "Sun Chaser," coming into Chicago, he was in a different dining car, he had no dealings with him and was not brought in contact with him in any way. **When McCampbell got on train No. 9, at 63rd Street that night, he was not expecting Hubbard to be on that diner** (R. 37 and 49) **and Hubbard was not on board the train** (R. 31).

So, Hubbard, with his antique pistol, passed out of the picture right after January 6th (R. 36) and was never on the same dining car with the crew in which McCampbell worked after that time. Therefore, even if Hubbard and his old pistol (which probably had not been loaded in fifty years) had ever been a menace so as to render Hunter's place to work unsafe, that menace had ceased to exist nearly three months before the accident occurred.

As to the bringing of pistols into the dining car by four or five men over a period of something more than a year before the accident, McCampbell alone attempted to cover that question and made a very weak showing.

What time of the day or night did these four or five men have pistols in the car? In what part of the car were they? Were the pistols loaded or empty? Did the men flourish them, play with them or handle them with great care? No answer to any of those questions can be found in the record. The result is that the statement that four or five men brought pistols into the car does not tend to prove that the place where Hunter worked was an unsafe place, nor that respondent could have known of them. Under some circumstances, handled very carefully, pistols would have created no danger in the diner, especially if they were empty. What were the circumstances surrounding the having of the pistols there? The record is entirely silent on all those questions. It does not tend to show that anybody ever played with a pistol in the dining car or ever had one in his hand when pushing, shoving, slapping or goosing anybody, or when others were doing so.

The horseplay, such as pushing, shoving, slapping and goosing was harmless pastime; nobody was ever hurt by it, nor was there any danger attendant upon such harmless play. It did not tend to render the place unsafe for the men to work in, nor to give notice to the respondent of any danger. No matter how many years such harmless play continued, it would still be harmless.

A new element was introduced into the play only a few seconds before the accident, to-wit, playing with a pistol. Of that new element respondent could not possibly have had actual notice, because, as all the evidence shows, no representative of respondent to whom notice would be binding upon respondent, was in the car; and respondent

could not have constructive notice in the few seconds during which the danger existed.

Petitioner's counsel tried to show by McCampbell that the steward had been present on previous occasions when pistols were brought into the car, but that attempt was a flat failure, for McCampbell refused twice to make any such statement (R. 104). Both the steward and the train conductor testified that they had never seen any pistols in the car or heard of any being brought in (R. 58 and 65), and they were not contradicted by anyone.

So we have a case where perfectly harmless playing, which has no tendency to produce injury, is indulged in. Suddenly a real danger appears in an instant, without opportunity on the part of the master to learn of it, and which is brought about by horseplay clear outside of the scope of anybody's employment or line of duty, and having no tendency to further the employer's business. The direct result was Hunter's death.

Nobody could know who was carrying a pistol. A man may carry a pistol for years without anybody discovering it. There certainly was no duty on the part of the respondent to search all the cooks and waiters every time they came into the car.

The safe place to work rule cannot be applied to such a situation as all the evidence reveals here.

Cases Cited by Petitioner Are Not in Point.

On the question of alleged violation of the safe place rule, petitioner relies on three cases, to-wit: Lillie v. Thompson, 332 U. S. 459, 68 S. Ct. 140, 173 Fed. (2) 481; Lavender v. Kurn, 327 U. S. 652, 66 S. Ct. 740, and Wilkerson v. McCarthy, 69 S. Ct. Rep. 413.

A brief review of the facts in each of these cases will demonstrate how entirely unlike the case at bar they are.

In the Lillie case the defendant prepared and furnished to a young woman telegraph operator a place to work through the night in a railroad car in a switching yard, a place infested with the roughest kind of men, both white and black, police characters, tramps, thugs, thieves and robbers—the very scum of the earth. Around the old car in which the young woman was required to work it was dark, no lights being furnished and no guards or railroad police being provided. All these facts were well known to the defendant long before the incident complained of in the case.

It was the duty of the woman operator to open the door when there was a knock, for messages were brought to her by switchmen who knocked upon the door. There was no glass in the door and she could not see who was knocking.

Late one night she heard a knock and opened the door. A big negro man forced his way into the car, seized the young woman, dragged her out into the dark, criminally assaulted her and cruelly beat her. What happened was just what should long have been anticipated by the employer.

Of course this Court held that a petition which stated the above facts stated a cause of action. There the notice of the danger had long been brought home to the employer—in fact the employer had created the dangerous situation.

In the Lavender case the opinion of this court shows that the decedent was required to work in a yard where, by reason of conditions therein, which had long existed, the place where he was required to work was made unsafe and such condition directly contributed to his being killed by a mail hook swinging out from the side of a passing train.

In that case the condition in the yard existed over a long period of time and was plainly visible to anyone passing along there.

In the Wilkerson case the railroad long had knowledge that a narrow walkway was used by switchmen customarily for crossing over a pit and was unsafe because narrow, insecurely fastened in place and greasy.

Here again we find a state of facts of which notice was brought home to the master long before the accident happened.

One more case is cited in petitioner's brief and is claimed to sustain his position, to-wit:

> Fletcher v. B. & P. R. R. Co., 168 U. S. 135, 42 Law. Ed. 411.

In that case the evidence showed that a work train gathered up laborers at a certain point in a city and carried them out to the country where they worked as a section gang, tearing out old ties and putting new ones into the track. The railroad had no use for the old ties and made no objection when the section men gathered them up and threw them into cars of the work train which took them back to the city. As the workmen approached their respective homes, they threw some of those old ties out upon the street, and in doing so endangered members of the public who happened to be passing. That was done in daylight with full knowledge of all the train crew and over a long period of time. By and by the inevitable happened—a member of the public was struck and injured by an old tie thrown from the train. He brought suit against the railroad and was permitted to recover, because, although the throwing out of the tie was done by a man who was not then acting in the scope of his employment or the line of his duty, the railroad company had actual notice of the custom and the danger to the public in ample time to have stopped the practice, but neglected to do so.

(5) and (6)

Respondent does not dispute the right of this court to review the entire record in passing upon the case.

(7)

An employer of labor is not obliged to foresee dangers that have never resulted in injury, and that no man on earth by the exercise of ordinary care could foresee.

Nowhere have we found a better statement on this subject than in

Webb's Pollock on Torts (Enlarged American Edition), pp. 45 and 46,

wherein the following statement is made:

> "Now a reasonable man can be guided only by a reasonable estimate of the probabilities. If men went about to guard themselves against every risk to themselves, or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in the particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability. And the statement proposed, though not positively laid down in Greenland v. Chaplin, 5 Ex. 248, namely, 'that a person is expected to anticipate and guard against all

reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur,' appears to contain the only rule tenable on principle where the liability is founded solely on negligence. 'Mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated,' may be the ground of legal compensation under some rule of exceptional severity, and such rules, for various reasons, exist; but under an ordinary rule of due care and caution it cannot be taken into account."

In Atchison etc. Ry. v. Calhoun, 213 U. S. 1, this Court referred to the above quotation on page 9 as follows:

"But even where the highest degree of care is demanded still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. It has been well said that 'if men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.' Pollock on Torts, 8th ed., 41."

The mere fact that the dining car steward had opportunity to learn that the waiters sometimes indulged in slapping, pushing, shoving or goosing each other had no tendency whatever to bring home notice to the master that two waiters, who had never previously engaged in anything that was in the least dangerous to others, would suddenly indulge in the folly of engaging in horseplay with a

loaded pistol, as they did on the night of the accident. The gift of prophecy would have been required for anybody to foresee such a thing.

The foregoing authorities demonstrate clearly that the respondent is not liable for failure to foresee and prevent such an unforeseeable and unpreventable occurrence as that which caused Hunter's death.

CONCLUSION.

The petitioner did not make a case on any possible theory. The trial judge, after the verdict of the jury was rendered, wisely determined that plaintiff had not succeeded in offering any evidence which entitled him to have his case submitted to a jury; and, therefore, the court, with commendable devotion to duty, sustained the respondent's motion for judgment notwithstanding the verdict. The Supreme Court of Missouri, in a fair and able opinion, approved the action of the trial court.

We respectfully submit that no showing has been made by petitioner which would justify this Court in issuing the writ prayed for, and that, therefore, the writ should be denied.

Respectfully submitted,

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